No. 89-1837

In The
Supreme Court of the United States
October Term, 1989

UNITED TRANSPORTATION UNION,
Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT GRAND TRUNK WESTERN RAILROAD COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, requires a railroad to participate in national multi-employer bargaining over its protest, where the railroad gives its unions notice of its intent to bargain individually prior to the beginning of national bargaining.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this case lists all parties to the proceedings below. Respondent Grand Trunk Western Railroad Company is a wholly owned subsidiary of Grand Trunk Corporation, which is owned entirely by Canadian National Railways, a Canadian Crown corporation.

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RESPONDENT GRAND TRUNK WESTERN RAILROAD COMPANY'S BRIEF IN OPPOSITION

Respondent Grand Trunk Western Railroad Company ("GTW") respectfully requests that this Court deny the petition for writ of certiorari submitted by the United Transportation Union ("UTU") seeking review of the Sixth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The Parties

GTW is a small Class 1 railroad,[1] employing approximately 3600 persons and operating 943 miles of track in Michigan, Ohio, Indiana, and Illinois. J.A. 23-24.[2] UTU represents GTW employees in the system wide crafts or classes of conductors, brakemen and yardmasters. For bargaining purposes, GTW's UTU-represented employees have been broken into five different UTU subunits, called General Committees, each of which has its own General Chairman.[3] The rates of pay, work rules, and working conditions for each craft or class are set forth in collective bargaining agreements with these UTU General Committees.

Bargaining in the Railroad Industry

Collective bargaining in the railroad industry is governed by the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA"). Railroad collective bargaining agreements typically have no fixed

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[1]A Class 1 railroad is defined by the Interstate Commerce Commission as a railroad earning more than $50 million per year in gross revenues. 49 C.F.R. Part 1201 General Instructions 1-1(a) (1988). In 1988 there were 16 Class 1 freight railroads and approximately 484 regional, local and switching railroads. Association of American Railroads, *Railroad Facts* 2 (1988).

[2]References to "J.A." are to the Joint Appendix filed with the Court of Appeals for the Sixth Circuit in this case.

[3]In a decision issued June 18, 1990, the National Mediation Board ("NMB") cancelled the separate UTU certifications relating to conductors and brakemen from the Detroit, Toledo & Ironton Railroad and the Detroit, Toledo & Shore Line Railroad, which had previously been merged into the GTW. *Grand Trunk Western R.R. Co.*, 17 N.M.B. 282 (1990). As a result of the NMB's ruling, there are now three UTU General Committees at GTW instead of the five that previously existed.

termination date, but become amendable upon expiration of a contract moratorium that commonly lasts three or four years. At the expiration of the moratorium, the parties become free to serve written proposals for changes in the agreements, pursuant to Section 6 of the RLA, 45 U.S.C. § 156. J.A. 26.

Historically, many, but not all, railroads have elected to bargain in multi-employer groups on certain issues, such as wages. The form of such multi-employer bargaining has changed over time. Prior to 1972, most railroads bargained in regional groups. Since 1972, most Class 1 railroads have elected to participate in multi-employer bargaining on a national level. The bargaining agent for participating railroads has been the National Carrier's Conference Committee ("NCCC"),[4] which is comprised of a representative from each of the participating major Class 1 railroads and a single representative for all other carriers that elect to participate in national bargaining. J.A. 25-26, 65. For any given round of national bargaining, those railroads choosing to participate authorize NCCC, through a power of attorney, to conduct bargaining on their behalf.[5] All participating railroads

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[4]The NCCC is part of the National Railway Labor Conference ("NRLC"), membership in which is open to any railroad operating within the United States. J.A. 63.

[5]The NLRC bylaws provide that "the [NCCC] shall be provided power of attorney by member railroads desiring representation under procedures approved by the [Executive] Board." J.A. 65-66. The bylaws further provide as follows:

> No member railroad shall be deemed a party to any joint labor negotiation conducted by the National Committee unless it has specifically consented through appropriate instructions or powers of attorney. Membership in this Conference shall not prohibit or restrain a member railroad from acting individually or

(continued...)

agree to be bound by a majority vote of the representatives on the NCCC as to any position to be taken in bargaining. J.A. 66. Over the years, individual railroads have from time to time declined to participate in a multi-employer bargaining unit, choosing instead to bargain all matters locally. J.A. 28-29.

GTW's Collective Bargaining History

GTW's agreements with the UTU General Committees have historically been the product of both national and local bargaining. During past rounds of national bargaining, GTW has, at the beginning of each round, given its written power of attorney to the NCCC to act on its behalf on certain issues. J.A. 26-27. GTW last participated in national bargaining with UTU in 1985. The agreements negotiated at that time by the NCCC with UTU on behalf of GTW and other participating carriers became amendable on April 1, 1988. *Id.*

In early 1988, GTW decided not to participate in the round of national bargaining that was to begin that year. GTW was concerned that its deteriorating economic condition and unique operating characteristics no longer could be addressed through group bargaining.[6] J.A. 27. At least one other small Class 1

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[5](...continued)

> jointly with other railroads in labor relations matters, except with respect to those issues in national handling and subject to an unrevoked power of attorney.

J.A. 67.

[6]The NCCC is dominated by the large Class 1 railroads, including GTW's competitors, who have different operating characteristics and cost structures and face different competitive pressures than GTW. J.A. 28-29.

railroad also announced its intention not to participate in national bargaining.[7] J.A. 28-29.

In accordance with its decision, GTW did not give a power of attorney to the NCCC and advised its Chairman that it would not participate in national bargaining. J.A. 29-30. On April 4, 1988, prior to the beginning of any national bargaining, GTW served Section 6 notices on each UTU General Chairman proposing changes in its collective bargaining agreements with each General Committee. In its notices GTW advised each General Chairman that "the Carrier intends to conduct the negotiations in connection with this notice on its own behalf. GTW is not authorizing a national conference committee to represent us in these negotiations." J.A. 29-30, 35-39. The General Committees served their own Section 6 notices, but disputed GTW's right to "withdraw" from national bargaining. J.A. 40-44.

GTW thereafter met with the five UTU General Committees over the matters raised by the parties' Section 6 notices. J.A. 30. On July 19, 1988 GTW reached agreement on new labor contracts with two UTU General Committees. J.A. 31. These agreements, which cover approximately 75 percent of GTW's UTU-represented employees, were ratified by the rank-and-file members of those General Committees, and have been put into effect. *Id.* GTW reached agreement with one more General Committee in early 1990, bringing to 97 percent the number of UTU-represented employees covered by agreements.

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[7]The Soo Line Railroad also decided not to participate in the current round of national bargaining. *See American Railway & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *pet. for cert. pending*, No. 89-1435 (filed March 13, 1990). In addition, in recent years Conrail and Amtrak, both of which are Class 1 railroads, have bargained individually, as have many of the new regional railroads created from spinoffs by some of the Class 1 railroads. J.A. 28-29.

Proceedings Below

UTU brought this action on behalf of the three General Committees which refused to acknowledge GTW's right to bargain individually. In its complaint, UTU alleged that GTW's refusal to participate in national bargaining violated GTW's duty to make and maintain agreements as set forth in Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First. J.A. 4-6. The district court granted summary judgment to GTW. *United Transp. Union v. Grand Trunk Western R.R.*, 712 F. Supp. 107 (E.D. Mich. 1989). J.A. 7-19. The Court of Appeals for the Sixth Circuit affirmed, upholding the district court's ruling that nothing in the RLA required a railroad to engage in national bargaining, and that such a requirement would violate the railroad's right under Section 2, Third, 45 U.S.C. § 152, Third, to choose its own bargaining representative. 133 L.R.R.M. (BNA) 2845 (6th Cir. 1990). The Sixth Circuit followed a similar ruling by the Court of Appeals for the Eighth Circuit in *American Railway & Airway Supervisors Ass'n v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *pet. for cert. pending*, No. 89-1435 (filed March 13, 1990).[8]

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[8]Although UTU identifies the Eighth Circuit's decision as a "companion" case to this one, the parties are different and the issues are not identical. In *Soo Line*, the railroad sought to bargain individually only as to a single issue -- health and welfare benefits -- and remained willing to participate in national bargaining as to all remaining issues. In contrast, GTW indicated its intent to bargain individually as to all issues.

REASONS WHY THE PETITION SHOULD BE DENIED

The Sixth Circuit's ruling that the RLA does not require GTW to participate in national bargaining does not warrant review by this Court. The right of a carrier (or union) to choose not to participate in future rounds of national bargaining is fully consistent with its duty to bargain in good faith under Section 2, First of the RLA. The history of collective bargaining in the railroad industry contains numerous instances of individual bargaining, refuting any claim that participation in national bargaining has ever been understood to be a requirement of the Act. The court below correctly recognized that GTW's *voluntary* participation in prior rounds of national bargaining did not mean that it could be forever forced to participate in future national bargaining against its will, and that such a requirement would deprive GTW of its right to select its own collective bargaining representative in direct violation of Section 2, Third of the Act, 45 U.S.C. § 152 Third. The Sixth Circuit's ruling is also consistent with precedent under the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"), which has recognized the right of an employer to withdraw from a multi-employer bargaining unit prior to the commencement of group bargaining. This Court upheld that principle in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982). Consideration of the same factors that support the NLRA precedent has led every court to consider the issue since *Bonanno* to conclude that national bargaining is not mandatory under the RLA where a railroad announces its intention to bargain individually before national bargaining commences,[9] thus belying any need for

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[9]*See United Transp. Union v. Chicago & Illinois Midland Ry.*, 731 F. Supp. 1336 (C.D. Ill. 1990), *appeal docketed*, No. 90-2057 (7th Cir.); *United Transp. Union v. Illinois Central Ry.*, 731 F. Supp. 1332 (N.D. Ill. 1990), *appeal docketed*, No.

(continued...)

"clarification" of railroads' obligations in these circumstances. UTU's predictions of dire consequences for the collective bargaining process in the railroad industry if the Sixth Circuit's decision is allowed to stand are unfounded and are in fact belied by the industry's long history of satisfactory labor relations even though national bargaining has never been universal.

Nor can review be predicated on the asserted conflict between the Sixth Circuit's decision and that of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). In that case, which was decided twenty-three years ago and did not have the benefit of this Court's *Bonanno* decision, the D.C. Circuit held that a union could not be forced to participate in national bargaining over an issue that had historically been bargained locally, stating that "[t]he Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest." 383 F.2d at 229. The court's further statement--on which UTU places so much emphasis--that national handling might be obligatory depending on an evaluation of the "appropriateness" of mass bargaining on the issue and the "historical experience" in handling the issue is thus *dicta*, and was unsupported by any discussion of the requirements of the RLA. Moreover, it is far from clear that UTU is correct in its assumption that application of the D.C Circuit's *dicta* in the present context will result in a conflict with the Sixth Circuit. The Staggers Rail Act of 1980 changed the competitive climate in the railroad industry in such a way that even the D.C. Circuit might find that national bargaining is no longer "appropriate" and the "historical experience" no longer relevant in the

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[9](...continued)
90-1952 (7th Cir.); *United Transp. Union v. Duluth, Missabe & Iron Range Ry.*, No. 5-88-0178 (D. Minn. decided Dec. 21, 1989), *appeal docketed*, No. 90-5038 MN (8th Cir.).

circumstances that now exist. In short, the *Atlantic Coast Line* decision at best presents only a hypothetical conflict with the Sixth Circuit's decision, and thus does not raise an issue that merits this Court's attention.

I. The Sixth Circuit's Refusal To Require GTW To Participate In National Bargaining Does Not Present A Significant Issue Under The Railway Labor Act

Stated simply, UTU claims in its petition that review by this Court is warranted because over time national bargaining has become so critical to successful labor relations in the railroad industry that the Sixth Circuit's decision poses a serious threat to the industry's continued stability. Pet. at 4. Whatever merit such a claim might have in a legislative context, it falls far short of suggesting that review of the Sixth Circuit's decision by this Court is necessary. The ruling below is fully consistent with the Act, with analogous rulings under the NLRA, and with industry practice. The mere fact that rail unions will now have to bargain with GTW and perhaps other carriers on an individual basis, and that some of the advantages that the unions perceive in national bargaining might be lost as a result, does not create the sort of threat to the industry's "stability" that courts may remedy.

A. The Ruling Below Is Fully Consistent With The RLA

UTU's position seems to be that once a railroad has agreed to participate in national bargaining, its duty to "make and maintain agreements" under Section 2, First of the RLA requires that it continue to do so in the future against its will. Section 2, First, however, simply does not provide either literal or theoretical support for the result that UTU seeks. Section 2, First provides that:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every

> reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . . .

Although this Court has described the duty imposed by Section 2, First as the "heart" of the RLA, *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), there are well-established limits on that section's scope. In *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971), this Court held that Section 2, First imposes a duty on railroads and unions to bargain in good faith. However, nothing in Section 2, First specifies how that bargaining is to occur.[10] Thus, this Court has cautioned that "great circumspection should be used in [extending judicial enforcement of Section 2, First] beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579 n.11.[11] Similarly, although Section 6 of the Act, 45 U.S.C. § 156, sets forth certain procedures that are to be followed before either party to an agreement can implement changes in rates of pay, rules, or working conditions, nothing in those procedures requires or even mentions multi-employer bargaining. Thus, Congress left the

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[10]*See Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 310 F.2d 503, 511 (7th Cir. 1962), *aff'd per curiam*, 372 U.S. 284 (1963) ("While in this case both parties recognize that collective bargaining between the Organizations and the Carriers is required by the Railway Labor Act, . . . we know of no requirement as to precise form or method of such bargaining.").

[11]The Court had earlier noted that "[t]he strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a 'desire not to reach an agreement,'" 402 U.S. at 578, *citing NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (lst Cir. 1953).

manner of bargaining entirely to the parties to each dispute, and the statute's silence as to the form such bargaining should take precludes any contention that the RLA mandates one form of bargaining over another.[12]

There is nothing inherently inconsistent with a railroad's decision not to participate in future rounds of national bargaining and its duty under Section 2, First to bargain in good faith. As issues and economic realities change, the circumstances that caused a party to decide to fulfill its bargaining obligation through a multi-employer group may no longer exist. A timely[13] decision not to participate further in a multi-employer group as a result of a good faith determination that the group decisionmaking process no longer serves that party's interests in no way implies the "desire not to reach agreement" proscribed by Section 2, First. Indeed, at the time UTU filed this lawsuit GTW had already reached agreements with two of the five General Committees representing its employees, and it has since

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[12]*Cf. Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841, 1850-51 (1987) (Section 2, First could not be the basis for regulating secondary picketing under the RLA, because the RLA was silent on the subject and "Congress has provided 'neither usable standards nor access to administrative expertise . . . .'").

[13]The timing of GTW's notice of its intention to bargain individually is not merely a "fortuitous" factual circumstance that has no relevance to GTW's obligations under the Act, as UTU suggests. Pet. at 8. Precedent under the NLRA has long distinguished between attempts to withdraw from multi-employer bargaining after such bargaining has commenced, which is considered to violate the duty to bargain in good faith, and withdrawal prior to the commencement of such bargaining, which is not considered to violate that duty. *See Retail Assoc., Inc.*, 120 N.L.R.B. 388 (1958).

reached agreement with a third, thus refuting any suggestion that a "desire not to reach agreement" was present in this case.[14]

On the other hand, as the Sixth Circuit correctly found, to require GTW, against its will, to participate in future rounds of national bargaining would contravene the express guarantee of Section 2, Third of the RLA. That section provides:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives.

The legislative history of the RLA confirms that Congress intended Section 2, Third to guarantee both carriers and unions freedom to choose who would represent them at the bargaining table.[15] In multi-employer bargaining, individual carriers agree to negotiate through a group representative, whose bargaining positions and strategies are directed by the group as a whole. J.A. 65-66. *See Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 613 n.21 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971) ("the NRLC is bound to act in accordance with the

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[14]GTW has also reached a new agreement with the Brotherhood of Locomotive Engineers, and contract discussions with three other unions are now in mediation before the NMB.

[15]*See Texas & New Orleans R.R. v. Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548, 569 (1930); *Hearings on H.R. 9861 Before the House Comm. on Rules*, 73d Cong., 2d Sess. 11 (1934), *reprinted in* M. Campbell & E. Brewer, 3 *The Railway Labor Act of 1926: A Legislative History* (1988) *("RLA History")* (J.A. 48-50); *Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 11 (1934), *reprinted in RLA History* (J.A. 51-55).

desires of the majority of the members of the multi-employer bargaining unit."). Because small railroads like the GTW have a very diluted vote on the NCCC, they effectively have no influence in deciding the NCCC's position. Participation in national bargaining thus necessarily entails the relinquishment of a small railroad's statutory right to choose its own representative. To the extent the decision to participate is voluntary, no violation of Section 2, Third exists. However, the critical element of voluntariness would be removed under a ruling that binds a party to future rounds of bargaining by virtue of its participation in the past. Certainly here, where the evidence is undisputed that the railroads gave new powers of attorney to NCCC for each round of bargaining in which they chose to participate,[16] there is no suggestion that the railroads understood that they were binding themselves to national bargaining for all time.[17]

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[16]*See* n.5. *supra*.

[17]The National Mediation Board has repeatedly characterized national bargaining as voluntary. For example, in its Sixth Annual Report to Congress in 1940, the NMB explained:

> Occasionally, when a national or regional movement for wage adjustments develops on the part of the carriers or organizations of their employees, the question arises as to whether the resultant disputes should be mediated individually or as a single case through relatively small conference committees representing all of the carriers on the one hand, and all of the employee organizations on the other. . . . However, as advantageous as is the handling of such disputes on a national or regional basis, *the Board definitely ruled during the past year that it was not authorized under the act to require such handling on the part of either the carriers or their employees. This method can be effected only by the agreement or consent of the parties involved.*

(continued...)

UTU's suggestion that national bargaining affects only the "forum for issue resolution" and not GTW's right to designate its own representative, Pet. at 8, thus does not reflect what the Sixth Circuit correctly recognized was the principal consequence of involuntary participation in the group, *i.e.*, loss of GTW's statutory right to choose its own bargaining representative. In light of the RLA's silence as to the form that bargaining must take, national bargaining cannot have so exalted a status as to justify a rule that subordinates all other statutory interests to its preservation. The mandate of Section 2, Third of the RLA simply does not permit a ruling that would require a carrier to participate in national bargaining over its objection.

B. The Ruling Below Is Fully Consistent With Existing Precedent Under The NLRA

The Sixth Circuit's decision accords fully with precedent under the NLRA, which has long recognized the right of employers to withdraw in a timely fashion from multi-employer bargaining. As this Court has explained:

> Until 1958, the [National Labor Relations Board] permitted both employers and the union to abandon the unit even in the midst of bargaining. . . . But in *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958), the Board announced guidelines for withdrawal from multiemployer units. These rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to

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[17](...continued)
National Mediation Board, *Sixth Annual Report* 4-5 (1940)(emphasis added). *See also* National Mediation Board, *Twenty-First Annual Report* 14 (1955); National Mediation Board, *Thirty-Second Annual Report* 9 (1966).

> withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is "mutual consent" or "unusual circumstances" exist. *Id.*, at 395.

Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 410-11 (1982). In *Bonanno*, this Court upheld an NLRB ruling that an impasse in multi-employer bargaining is not an "unusual circumstance" that will justify mid-bargaining withdrawal. *Id.* at 412. Underlying the long line of decisions on this issue has been the fundamental principle that an employer's decision to participate in multi-employer bargaining is purely voluntary. "The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining." 454 U.S. at 412.[18]

Although the UTU argues that NLRA precedent "is of not significant moment in this case," Pet. at 6, this Court has found analogies between the RLA and the NLRA appropriate when the two Acts' policies are similar. *See, e.g., Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants,* 489 U.S. 426, 109 S. Ct. 1225, 1233 (1989); *Brotherhood of R.R. Trainmen v.*

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[18]Under the NLRA, the test for determining whether an employer is bound to group bargaining is whether the employer has indicated from the outset an unequivocal intention to be bound by group action and collective bargaining. *See, e.g., Carpenter's Local Union No. 345 Health & Welfare Fund v. W.D. George Constr. Co.,* 792 F.2d 64, 69 (6th Cir. 1986). An employer may withdraw from the group upon "evidence of an intent to pursue an individual course of action with respect to labor relations." *Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co.,* 828 F.2d 79, 83 (2nd Cir. 1987); *Ruan Transport Corp.,* 234 N.L.R.B. 241, 242 (1978).

Jacksonville Terminal Co., 394 U.S. at 383. The policies implicated by forced participation in national bargaining are identical under both Acts. Both Section 2, First of the RLA and Section 8(d) of the NLRA, 29 U.S.C. § 158(d), impose the same duty to bargain in good faith. *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. at 578-79 (citing NLRA cases).

Similarly, both Section 2, Third of the RLA and Section 8(b)(1) of the NLRA, 29 U.S.C. § 158(b)(1)(B), prohibit interference in the selection of the other party's bargaining representative. Indeed, this Court has recognized that Section 8(b)(1)(B) of the NLRA was patterned after Section 2, Third of the RLA.[19] The same policy of non-interference underlies both NLRA Section 8 and RLA Section 2, Third. *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266 (1938). In *Florida P. & L. Co. v. International Bhd. of Electrical Workers*, 417 U.S. 790, 799 (1974), this Court observed that the legislative history of Section 8(b)(1)(B) revealed "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units." *Id.* at 803.[20] The similarities between the two Acts are counterbalanced by no

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[19]Section 8(b)(1)(B) provides that unions may not "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining . . . ." 29 U.S.C § 158(b)(1)(B).

[20]*See also General Teamsters Local Union No. 174 v. NLRB*, 723 F.2d 966, 971 (D.C. Cir. 1983) ("right of employees and of employers to choose their own representatives in formal labor negotiations . . . is 'fundamental to the statutory scheme.'"); *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2nd Cir. 1969) ("either side can choose [representatives] as it sees fit and neither can control the other's selection . . . .").

significant differences that would justify a different result under the RLA.[21]

C. The Ruling Below Will Not Disrupt Collective Bargaining In The Railroad Industry

UTU's assertions that the Sixth Circuit's ruling will undermine existing national agreements and lead to labor disputes are exaggerated at best, and irrelevant in any event. As noted above, national bargaining never has been universal,[22] and the ability of some railroads to bargain individually has not historically resulted in disruptions in service or destruction of the

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[21]National bargaining in the railroad industry finds striking parallels in several NLRA industries. For example, as in the rail industry, multi-employer collective bargaining in the trucking industry evolved first on a regional basis in the 1950's. In 1964, trucking companies agreed to bargain on a national basis for a National Master Freight Agreement covering wages and fringe benefits. The national agreement was supplemented by local agreements. Industrial Relations Research Association, *Collective Bargaining: Contemporary American Experience* 106-07 (1980). Like the railroad industry, the trucking industry was regulated pursuant to the Interstate Commerce Act. Congress essentially deregulated the trucking industry in 1980, with enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 96th Cong. 2d Sess. (1980). As a result of deregulation, and the competition it brought, the long-standing centralized bargaining in the trucking industry has begun to break-up, with many trucking companies now bargaining on an individual basis. *See, e.g.*, T. Kochan, H. Katz & R. McKersie, *The Transformation of American Industrial Relations* 128-30 (1989). Similarly, competitive pressures in the steel industry, brought about in part by foreign competition, caused the break-up of the steel industry's 30-year tradition of national bargaining. *Id. See also* J. Hoerr, *And the Wolf Finally Came: The Decline of the American Steel Industry* 474-76 (1988); B. Fischer, *Impact of Transition on Steel's Labor Relations*, 1986 Lab. L. J. 569. *See generally* R. Hoffman, *The Trend Away From Multi-Employer Bargaining*, 1983 Lab. L. J. 80.

[22]The National Mediation Board has noted on numerous occasions that not all railroads have participated in national bargaining. *See, e.g.*, National Mediation Board, *Forty-Sixth Annual Report* 4-5 (1980); National Mediation Board, *Forty-Seventh Annual Report* 5 (1981); National Mediation Board, *Fiftieth Annual Report* 5 (1984).

collective bargaining process for the rest of the industry. As GTW's success in obtaining agreements with two (and later three) of its UTU General Committees demonstrates, individual bargaining does not inevitably lead to strikes. The loss of whatever efficiencies national bargaining might be thought to provide as carriers, in response to economic and competitive pressures, elect not to participate in future rounds of national bargaining, does not represent the sort of disruption of the bargaining process that warrants scrutiny by this Court. On the other hand, voluntary participation in national bargaining would be discouraged if such participation meant that the right to bargain individually would be forever lost. The Sixth Circuit's ruling thus in no way disserves the statutory interest in the peaceful resolution of labor disputes.

II. The Sixth Circuit's Decision Does Not Conflict With D.C. Circuit Precedent

UTU's contention that the ruling below conflicts with the D.C. Circuit's *Atlantic Coast Line* decision is without merit. In *Atlantic Coast Line*, a group of carriers sought to require a union to bargain with them nationally over an issue that had previously been bargained primarily at the local level. The D.C. Circuit, like the Sixth Circuit here, held that the union could not be compelled to bargain nationally over its objection.[23] 383 F.2d

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[23]In an *amicus* brief filed with the D.C. Circuit, the United States urged the court to rule that national bargaining could not be compelled:

> [T]he ruling below eliminates the freedom of the parties to choose to engage in local bargaining, a freedom which until now has been regarded as a basic tenet of collective bargaining. In the railroad industry, as well as in industries under the NLRA, it has been -- and should be -- the rule that multi-employer bargaining is based upon consent of both parties.

(continued...)

at 228. The court explained that "the Railway Labor Act does not universally and categorically compel a party to a dispute to accept national bargaining over its protest." *Id.* at 229. Noting that national bargaining was "certainly lawful," the D.C. Circuit went on to state that "whether [national bargaining] is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." *Id.* The court concluded that the "history and realities" of industry bargaining on the issue in dispute established that national bargaining on that issue was not required.[24] *Id.*

UTU's attempt to create a conflict between the D.C. Circuit's decision and that of the Sixth Circuit below fails for several reasons. First, the statement on which UTU relies is classic *dicta*. Given that "no holding can be broader than the facts before the court," *United States v. Stanley*, 483 U.S. 669, 680 (1987), the D.C. Circuit's statements regarding a possible obligation to bargain nationally did not constitute its holding in the case. Having determined as a matter of fact that the issue

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[23](...continued)

Brief of United States as *Amicus Curiae* at 11, *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968).

[24]The D.C. Circuit's attempt to draw a distinction between "local" and "national" issues based on historical experience in the industry is patently unsound. To find that the large number of railroads that elect not to participate or have never participated in national bargaining can be required to do so simply because other railroads once chose to bargain as a group has no support in the Act, and the type of inquiry required, besides being ill-suited to judicial determination, "risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements." *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. at 579 n.11.

in dispute had previously been bargained locally, and as a matter of law that national bargaining of a "local" issue could not be required over a party's protest, the D.C. Circuit had no need to decide whether national bargaining could ever be required based solely on that party's previous participation in such bargaining.[25] Second, the absence of any discussion by the D.C. Circuit of Section 2, First or Section 2, Third makes clear that the arguments decided by the Sixth Circuit were not addressed in the earlier case, further diminishing any possible weight that the court's statement might have. Despite the fact that many railroads have bargained locally both before and after the *Atlantic Coast Line* decision, no court, including the D.C. Circuit, has ever held that a railroad may be forced to participate in national bargaining over any issue where the railroad, prior to the commencement of national bargaining, has advised the union of its intent not to participate.[26]

Finally, UTU's assumption that application of the D.C. Circuit's twenty-three year old *dicta* today would result in a conflict with the Sixth Circuit's decision is not at all self-evident. As already noted, the "history" of bargaining in the rail industry

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[25]It cannot be assumed that the D.C. Circuit would apply the same criteria to determine a railroad's obligation to bargain nationally as it applied to determine the union's obligation. At the time of the *Atlantic Coast Line* ruling, courts read the NLRA to impose different requirements on unions than on employers insofar as multi-employer bargaining was concerned. *See, e.g., Publishers' Ass'n of New York City v. NLRB*, 364 F.2d 293 (2nd Cir.), *cert. denied*, 385 U.S. 971 (1966).

[26]The only courts that have required parties to participate in national handling against their will have done so because the parties did not seek to bargain individually until after national bargaining was underway. *See, e.g., Chicago, Burlington & Quincy R.R. v. Railway Employees' Dep't*, 301 F. Supp. 603 (D.D.C. 1969). This result is entirely consistent with authority under the NLRA. *See* n.13, *supra; Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. at 410-11.

is replete with instances of individual bargaining. Moreover, in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 96th Cong., 2nd Sess. (1980), Congress substantially deregulated the railroad industry with the clear intention that railroads operate in a more competitive manner.[27] *See, e.g., Coal Exporters Ass'n v. United States,* 745 F.2d 76, 80-81 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1072 (1985). Congress clearly has intended that railroads have greater individual freedom to determine their own cost structures, including labor costs. *See, e.g.*, H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 42-43, 119-21 (1980). *See also American Short Line R.R. Ass'n v. United States,* 751 F.2d 107, 109-110 (2nd Cir. 1984). The requirement that railroads be compelled against their will to bargain issues such as wages in national bargaining is flatly inconsistent with Congress' intention, as clearly expressed in the Staggers Act, that railroads price their services competitively. Requiring railroads to bargain wages and other significant labor cost items on a national basis would effectively remove such topics from competition. A railroad wishing to adjust its cost structure to be able to price its services to meet competition in its own particular market will not be able to do so if a significant element of its costs must be set on a uniform national basis. The changes brought about by the Staggers Act surely have a role in a court's evaluation of the "practical appropriateness" of national bargaining, and the recency of that legislation certainly reduces any significance that the industry's "historical experience" might otherwise have. *See*

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[27]For example, prior to passage of the Staggers Act, railroads could collectively agree on railroad rate increases, which would go into effect if approved by the Interstate Commerce Commission. Railroads could lawfully fix prices on a collective basis through membership in rate bureaus. *See, e.g., American Short Line R.R. Ass'n v. United States*, 751 F.2d 107, 109 (2nd Cir. 1984). The railroads would then pass through any collectively-bargained labor cost increases to shippers. *See, e.g., Increased Freight Rates and Charges, 1974, Nationwide*, 349 I.C.C. 862, 865 (1975) (approving 4% rate increase in part based on railroad's agreement to 4% wage increase).

United Transp. Union v. Grand Trunk Western R.R., 712 F. Supp. at 112 ("Because labor costs are a significant component of [a railroad's] costs, requiring national bargaining would be inconsistent, not only with the Railway Labor Act, but with the goals of the Staggers Act. Accordingly, even if the D.C. Circuit's dicta could be given the meaning UTU's [sic] desires, this Court finds that national bargaining under the circumstances of this case is no longer 'practically appropriate.'"). J.A. 16-17. Consequently, the D.C. Circuit might well decide that the gloss it put on Section 2, First, in *Atlantic Coast Line* is no longer valid. *See United States v. Fausto,* 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implication of a statute may be altered by the implications of a later statute.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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